In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1089

LEONARD DUNCAN, ET AL., PETITIONERS

v.

HAROLD CRANSTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT SECRETARY OF AGRICULTURE IN OPPOSITION

Petitioners are dairy farmers who market their milk under the Federal Milk Marketing Order for Connecticut, 7 C.F.R. 1015.72, and who oppose the farm location differential provision of that Order. Respondents Harold Cranston, *et al.*, who are also dairy farmers marketing their milk under the Connecticut Order, brought suit in the United States District Court for the Northern District of New York, challenging the validity of the differential provision. Subsequent to this Court's ruling in *Zuber* v. *Allen*, 396 U.S. 168, the Court of Appeals for the Second Circuit held that the Connecticut differential was invalid, and remanded the case to the district court for disposition consistent with the *Zuber* ruling. 428 F. 2d 822.

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Petitioners, although satisfied with the court of appeals' holding that the differential was invalid, attack subsidiary rulings of the district court (290 F. Supp. 785 at 788–789, 812–813) and of the court of appeals, which allowed the *Cranston* suit to be maintained as a class action, and rejected petitioners' assertions that the *Cranston* suit was a collusive one solicited and controlled by the farm cooperative of which Cranston, *et al.*, were members. In addition, petitioners seek review of questions upon which neither the district court nor the court of appeals has yet passed, concerning what relief is proper and consistent with *Zuber*.[1]

After a three-day trial upon petitioners' charge of collusion, the district court rejected it. The court of appeals determined that this issue had been "properly resolved" by the district court (428 F.2d at 823). The determination of this factual issue by both courts below does not warrant further review. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275. Similarly, there is no occasion here to review the determinations of both courts below that this suit was properly brought as a class action.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

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[1] Motions for amplification of the Second Circuit's mandate, to resolve issues which have arisen concerning the proper relief, are currently pending before that court.

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